Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

(4)

No. 90-1424

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, THE ALLIED EDUCATIONAL FOUNDATION, THE HONORABLE ORRIN G. HATCH, UNITED STATES SENATOR, AND THE HONORABLE DAN BURTON, MEMBER OF CONGRESS, IN SUPPORT OF PETITIONER

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June 27, 1991

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in Washington, D.C., which is dedicated to supporting the

free enterprise system and promoting the principles of judicial restraint. Current membership in the WLF is approximately 120,000 individuals and businesses nationwide. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums. To this end, WLF has appeared in this Court as well as other state and federal courts as *amicus curiae* in cases affecting the free enterprise system.[1] In particular, WLF is interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these indicia of a properly-operating free enterprise system are threatened by undue judicial interference with the actions of the elected Branches of government. Accordingly, WLF has been active in this Court and other federal courts as *amicus curiae* asserting the necessity for strict adherence by the federal courts to the principle of separation of powers.[2]

The Allied Educational Foundation ("AEF") is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as law and public policy.

The Honorable Orrin G. Hatch is a United States Senator representing the State of Utah. The Honorable Dan Burton is a Member of Congress representing the State of Indiana. As representatives of the people elected to serve in the Legislative Branch of the federal government, they have an interest in ensuring that the

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[1] *E.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Meese v. Keene*, 481 U.S. 465 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

[2] *E.g., Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

principle of separation of powers is observed by the Judicial Branch.

In this particular case, judicial interference with the statutory interpretation set forth in the regulation at issue here threatens to interfere with United States foreign policy and violates the principle of separation of powers. Accordingly, WLF, AEF, Senator Hatch and Congressman Burton file this brief as *amici curiae* urging reversal of the decision below.

Amici submit this brief on behalf of petitioner with the written consent of both parties.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt by reference the statement of the case set forth by petitioner.

SUMMARY OF ARGUMENT

Prior to 1968, the standing requirement of a particularized injury was uniformly applied by the Court to all manner of cases. This uniform application of this traditional standing requirement was critical to restricting the federal judiciary to the limited constitutional role accorded it under the principle of separation of powers: protection of individual rights rather than the administration of public policy.

Beginning in 1968 and continuing into the early 1970s, however, the Court relaxed this traditional standing requirement. This was especially true with respect to lawsuits brought under the Administrative Procedure Act

(the "APA").[3] In particular, the Court adopted an expansive view of what would constitute under Section 10 of the APA, 5 U.S.C. § 702, the sort of injury to a plaintiff sufficient to provide standing for judicial review. Over a series of decisions, the Court articulated the position that individuals had standing to seek judicial review of executive branch actions of widespread application, merely by alleging injury to a generalized interest shared by all citizens.

The Court has since substantially returned to the traditional position that the particularized injury requirement is a necessary element of standing. None of these later cases, however, arose under the APA, and lower courts have concluded, as did the Eighth Circuit here, that, when suit is brought challenging an administration action, it is sufficient for a plaintiff to establish standing by pleading an injury that is generally shared by all citizens and not particular to the litigant.

Last term, in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), the Court suggested that the "expansive expression of what would suffice for § 702 review" posited by the Court in the early 1970s is no longer sufficient. *Id.* at 3189. The Court indicated that complaints about "rules of general applicability" could not serve as a basis for judicial review under the APA. *Id.* at 3190. The Court, however, did not expressly state that the traditional standing requirement of particularized injury is as fully applicable to lawsuits brought under Section 10 of the APA as to any other lawsuit. Nor did the Court expressly overrule its decisions endorsing an expansive view of standing, although the Court did leave significant doubt as to the continuing validity of those decisions. As a

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[3]Pub. L. No. 89-554, 80 Stat. 392 (codified as amended in various sections of Title 5 of the United States Code).

result, the court below treated *Lujan v. National Wildlife Fed'n* as only imposing an additional pleading requirement. 911 F.2d 117, 121 (8th Cir. 1990).

Amici contend that, even if respondents alleged with sufficient specificity a "direct injury" to its members, they lack standing to challenge the interpretive regulation at issue. Respondents' asserted injury is a generalized one, shared equally by all citizens, and therefore is not cognizable under the traditional requirement of standing that a plaintiff establish a particularized injury distinct from most other citizens.

Thus, this lawsuit epitomizes the confusion of the lower courts with respect to the applicability of the traditional standing principle of a particularized injury in the administrative law context. The failure of the lower courts to apply the requirement of a particularized injury in the administrative law context has led to an evisceration of the principle of separation of powers, resulting in "an overjudicialization of the process of self-governance."[4] The federal judiciary, rather than elected officials, continue to assume the role of unelected administrator of public policy, despite the Court's rather explicit comments in *Lujan v. National Wildlife Fed'n* that such "sweeping actions" are for the Executive and Legislative Branches and are not the "traditional . . . mode of operation" of the Judicial Branch. 110 S. Ct. at 3191.

Amici will argue that the Court should clearly articulate that the asserted injury by which a litigant claims standing to challenge an administrative action must be a particularized one which sets him or her apart from other citizens. In order to do so with unambiguous clarity, the

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[4]Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

Court should expressly overrule its prior decisions to the contrary. The re-establishment of the traditional understanding of the doctrine of standing is critical to ensuring that the federal judiciary is restricted to its constitutional role of protecting individual rights rather than generalized societal goals and must be applied uniformly to all lawsuits brought in the federal courts including those brought under the APA.

ARGUMENT

A. The Requirement Of A Particularized Injury Is Essential To Preserving The Principle Of Separation Of Powers.

The doctrine of standing is fundamental to the maintenance of our constitutional form of government. Its purpose is to give effect to the principle of separation of powers[5] by confining the judicial branch to the exercise of its "inherently distinct" power[6] to adjudicate the rights of individuals as presented in "cases" or "controversies."[7] Whereas the elected Branches are concerned chiefly with broad societal interests, the judiciary is concerned with individual or minority rights, including rights that may be threatened as a consequence of legislative or executive

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[5]*Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*) (the doctrine of standing serves as a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

[6]*Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982).

[7]U.S. Const. art. III, § 2.

action.[8] The doctrine of standing serves to identify the individuals or minority groups entitled to judicial protection and to ensure that such protection is available when the legally protected rights of those individuals or groups are infringed or threatened. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court articulated the importance of the doctrine of standing, and especially the requirement of a particularized injury, in preserving the principle of separation of powers. In *Frothingham*, a taxpayer sought to restrain payments from the United States Treasury to several states that chose to participate in a federal program established through the Maternity Act of 1921. The plaintiff claimed that the federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such appropriations would cause an increase in her taxes and "thereby take her property without due process of law." *Id.* at 486. The Court did not reach the merits of the claim, holding instead that neither her purported injury nor the "right" invaded was an appropriate basis on which to invoke the power of the Court. The taxpayer's "interest in the money of the treasury . . . is shared with millions of others, is comparatively minute, and indeterminable, and the effect upon future taxation . . . so remote, fluctuating and uncertain that no basis is afforded" for judicial review. *Id.* at 487.

In order to meet the standing requirement, the Court wrote:

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[8] *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("The province of the Court is, solely, to decide on the rights of individuals . . . .").

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[9]

The Court in *Frothingham* concluded that unless a litigant sought to resolve a dispute that affected him *particularly*, as opposed to the public at large, the dispute was to be resolved not by the judiciary, but by the elected Branches of the government.

B. The Elimination Of The Particularized Injury Requirement Eviscerates The Principle Of Separation Of Powers.

Until 1968, the *Frothingham* requirement of particularized injury was applied uniformly by the Court in cases arising under the APA[10] as well as in other contexts.[11] In *Flast v. Cohen*, 392 U.S. 83 (1968), however, the Court seemed to sever the doctrine of standing from any role in

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[9]262 U.S. at 488.

[10]*E.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (drug manufacturers had standing under the APA to challenge Food and Drug Administration regulations specifically directed at drug manufacturers); *American Trucking Ass'n, Inc. v. United States*, 364 U.S. 1 (1960) (granting standing under the APA to a trucking association to challenge a regulation affecting railroads due to the trucking industry's pecuniary interest as a competitor).

[11]*E.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (holding that "[t]he common thread underlying [standing] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation").

preserving the principle of separation of powers. In holding for the first time that a federal taxpayer had standing to challenge, on Establishment Clause grounds, federal expenditures to assist church-run schools, the Court stated:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[12]

Thus, although the taxpayer-plaintiff in *Flast* had not suffered an injury that had set him apart from all other citizens, the Court held that he could challenge the expenditure of funds at issue.

In 1970, the Court applied this new expansive view of standing to lawsuits challenging administrative action. The Court did so by "discovering" for the first time since enactment of the APA that Congress had intended Section 10 of the APA to eliminate the particularized injury

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[12]392 U.S. at 100-01.

requirement in lawsuits brought under the APA.[13] This provision of the APA provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702 (1988). In *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), and *Barlow v. Collins*, 397 U.S. 159 (1970), decided on the same day, the Court interpreted Section 10 of the APA to confer standing on any complainant so long as "the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. The Court also expanded the type of interests that could serve as a basis for standing to include "aesthetic, conservational, and recreational as well as economic values." *Id.* at 154 (quoting *Scenic Hudson Preservation Soc'y Conf. v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965)).

The Court's decisions in *Data Processing* and *Barlow* effectively reversed the previous three decades' understanding that Section 10 of the APA did not expand the ability of plaintiffs to seek review of administrative action. The Court's new interpretation of Section 10 of the APA had the effect of allowing persons to bring suit

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[13]In fact, however, the legislative history of the APA is clear that Congress intended Section 10 to reflect the then-existing law of standing and not to work any change in the traditional requirement of a particularized injury. S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945). Similarly, the Attorney General's Manual on the Administrative Procedure Act described Section 10 as "a restatement of existing law." Attorney General's Manual On The Administrative Procedure Act 96 (1947). A good review of the legislative history of Section 10 is set forth in Note, *Competitors' Standing to Challenge Administrative Action under the APA*, 104 U. Pa. L. Rev. 843, 856-60 (1956).

challenging administrative action regardless of whether they could allege a particularized injury.

Two decisions by the Court in the early 1970s unambiguously articulated the abandonment of the particularized injury requirement. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), an environmental organization sued to enjoin the development of a ski area in California's Sequoia National Park. The organization averred that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park for future generations." *Id.* at 734. The organization failed, however, to plead or allege that any of its members would be affected by the development of the ski area. *Id.* at 735. The Court regarded this pleading defect as fatal to the plaintiff's standing. The Court noted, however, that the trend of its decisions "has been toward recognizing that injuries other than economic harm are sufficient [to establish standing] and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review." *Id.* at 738.

The pleading defect of *Sierra Club* was held to be remedied in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("*SCRAP*"). In *SCRAP*, an association filed suit to enjoin an order by the Interstate Commerce Commission allowing railroads to collect a 2.5% rate surcharge. The basis of the association's claim was that the railroad rate surcharge would make the transportation of recyclable materials to recycling centers too costly. As a consequence, there would be less recycling, an increase in litter, and greater use of natural resources rather than recycled materials. The association's members claimed that they would be personally harmed by the resultant air pollution from an increased use of incinerators and that the local parks and

forests on which they claimed to recreate would be scarred from natural resource exploitation and garbage. *Id.* at 678.

The Court held that the association members had alleged a sufficient injury to establish standing. "[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing." *Id.* at 686-87. Indeed, the Court intimated that "all who breathe the air" had standing to challenge the surcharge at issue. *Id.* at 687. As the Court stated:

> [W]e have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions. To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

Id. at 687-88.

SCRAP, of course, ignored the fact that under the Constitution there is always redress for governmental action by petitioning the elected Branches to which the Constitution entrusted responsibility for the making of public policy affecting broad societal interests. If those Branches are not responsive to the public policy views of

the *majority*, they may be replaced through the electoral process. By embarking on the course initiated in *Flast* of reading out of the standing doctrine any concern for the principle of separation of powers, the result reached in *SCRAP* -- that the federal judiciary must be open to address public policy issues that affect most or even all citizens -- was inevitable. Thus, the federal judiciary becomes an unelected policy-making Branch of the government in derogation of the principle of separation of powers.

C. The Particularized Injury Requirement Should Be Applied Uniformly To All Manner Of Lawsuits.

One year after the *SCRAP* decision, in a case not brought under the APA, the Court initiated a return to the traditional standing requirement of a particularized injury. In *United States v. Richardson*, 418 U.S. 166 (1974), the Court refused to find that a taxpayer had standing to seek to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency. The Court stated that, although the plaintiff possessed a "genuine interest in the use of funds, . . . he has not alleged that, as a taxpayer, he is in danger of any particular concrete injury as a result" of the failure to publish such an accounting. *Id.* at 177. The plaintiff merely sought to employ a "federal court as a forum in which to air his generalized grievances about the conduct of government." *Id.* at 173 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court denied standing to citizens who sought to enforce the Incompatibility Clause of the Constitution[14] against Members of

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[14]U.S. Const. art. I, § 6, cl. 2.

Congress who held reserve military commissions. The Court held that plaintiffs alleged only "the abstract injury in non-observance of the Constitution. . . ." *Id.* at 223 n.13. The Court noted that the need for a distinct injury not shared by the citizenry in general is essential to standing, particularly where "the relief sought would, in practical effect, bring about conflict with two coordinate branches." *Id.* at 222.

The Court's decisions in *United States v. Richardson* and *Schlesinger v. Reservists Committee to Stop the War* can be viewed as restoring the particularized injury requirement of *Frothingham* and limiting *Flast* to its strict facts.[15] This is confirmed by the fact that both decisions quote the following passage from *Ex Parte Levitt*, 302 U.S. 633 (1937).

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Id. at 634.

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[15]*See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 463 (1982) (holding that taxpayers do not have standing to challenge an incidental disposition of government property by an executive officer as inconsistent with the Establishment Clause).

The Court repeatedly reaffirmed the particularized injury requirement during the late 1970s, disavowing the *dictum* of *Flast* that the doctrine of standing "does not, by its own force, raise separation of powers problems," *Flast*, 392 U.S. at 100, and taking the position that the requirement of standing "is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Throughout the 1980s, the Court continued to articulate explicitly the intimate relationship between the doctrine of standing and the Constitution's principle of separation of powers.[16]

During this time, however, the Court did not have the opportunity to revisit the doctrine of standing in the context of the APA. Although there is no principled explanation for a more relaxed standing requirement under the APA, the lower courts continued to rely upon the decisions in *Data Processing*, *Sierra Club* and *SCRAP* to find standing in lawsuits brought under Section 10 of the APA that alleged only generalized grievances shared broadly by most citizens. The result, as with the instant case, was to substitute the federal judiciary as public-policy makers in the place of legislators and executive officers in derogation of the principle of separation of powers.

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[16]*E.g.*, *Allen v. Wright*, 468 U.S. 737, 738 (1984) (holding that parents of black school children did not have standing to challenge a decision by the Internal Revenue Service to confer tax-exempt status on allegedly racially discriminatory private schools because their children were not denied equal treatment by the challenged discriminatory conduct); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that "federal court[s] may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional").

Last term, however, in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), the Court considered the contours of the doctrine of standing under the APA for the first time since *SCRAP*. In *Lujan v. National Wildlife Fed'n*, an environmental organization sought judicial review under Section 10 of the APA of the administration by the Bureau of Land Management of its "land withdrawal review program." In order to establish standing, the National Wildlife Federation ("NWF") principally relied upon the affidavits of two members who claimed to have recreated "in the vicinity" of parcels of land included within the program. With respect to this assertion, the Court found that the affidavits lacked the requisite degree of specificity to meet the NWF's burden on a motion for summary judgment. *Id.* at 3189.

The Court also held that certain additional affidavits by other NWF members alleging rampant violations of the law in the administration of the land withdrawal review program failed to provide the NWF with standing because the affidavits did not identify a specific final agency action ripe for judicial review, only a rule of general applicability. *Id.* at 3190. The Court indicated that an across-the-board challenge to a general program must be made to the elected Branches, not the Judicial Branch. *Id.* at 3191.

Finally, the Court rejected the argument that the NWF had standing under Section 10 of the APA because the Bureau of Land Management's failure to provide information and opportunity for public participation in the land withdrawal review program had impaired the NWF's ability to perform its "mission" to inform its members about conservation issues. *Id.* at 3193-94. The Court found that the NWF failed to identify any "particular 'agency action'" that was the source of this purported injury. *Id.* at 3194.

Lujan v. National Wildlife Fed'n suggested that the showing of a particularized injury is a required element of any standing analysis under the APA. Although *SCRAP* and its predecessors were not expressly overruled, the Court noted that *SCRAP* "has never since been emulated by this Court . . . ." *Id.* at 3189.

D. Respondents Have Not Alleged A Particularized Injury.

Unfortunately, the lower federal courts have chosen to regard *Lujan v. National Wildlife Fed'n* as merely imposing an additional pleading burden upon plaintiffs.[17] Thus, the court below held that respondents had met their burden to establish standing on two grounds. First, respondents had submitted affidavits showing that their members had visited foreign countries in which specific projects funded in part by United States aid funds would purportedly affect endangered species. The members asserted an intent to return in the future to these countries and that their ability to view wildlife would be impaired by the completion of the projects. 911 F.2d at 120. Second, the respondents alleged a procedural injury resulting from the failure of the Secretary of the Interior to carry out the required consultation procedure. *Id.* at 121-22.

Although the court below recognized *Lujan v. National Wildlife Fed'n* as being applicable, it held that the respondents had, unlike the NWF, provided specific facts indicating recreational use of specific habitats that would be affected by projects on which the Secretary of the Interior had not met his consultation obligation. *Id.* at

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[17] *E.g., Cornell Village Tower Condominium v. HUD*, 750 F. Supp. 909, 918 (N.D. Ill. 1990); *Greenpeace, USA v. Stone*, 748 F. Supp. 749, 755 (D. Hawaii 1990).

120-21. Assuming that this is correct and that, unlike the NWF's affidavits in *Lujan v. National Wildlife Fed'n*, the affidavits submitted by the respondents in this case do set forth with adequate specificity a "direct injury" to their recreational interests, *amici* argue that respondents still lack standing to challenge the interpretive regulation at issue because they have not suffered a particularized injury distinct from that suffered by the vast majority of other citizens.[18]

Respondents assert standing based upon two types of injuries. Respondents' first alleged injury was their diminished ability to observe wildlife in their natural habitat due to the impact on wildlife of development projects partially funded by the United States. But the ability of each citizen to observe wildlife in their natural habitat is diminished equally under the interpretive regulation at issue.[19] Respondents do not claim, nor can they claim, that they possessed a greater right than their fellow citizens to view wildlife in the affected habitats. Accordingly, respondents are not *distinctly* affected by the diminished ability to observe wildlife. In short, respondents have suffered no particularized injury.[20]

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[18]*Amici* do *not* argue that an interest in aesthetic, conservational or recreational values is insufficient to support standing, rather that any injury to such an interest must be particularized and not broadly shared by most Americans.

[19]50 C.F.R. § 402.01 (1986).

[20]There is a suggestion in the decision below that the respondents did suffer some harm different from other Americans because they actually visited the affected sites and expressed an interest to visit again in the future. 911 F.2d at 120-21. Past use, however, does not indicate the existence of an interest, it merely indicates the strength of the individual's interest. Respondents may *care* more about the diminished ability to observe wildlife in their natural habitat than

(continued...)

Respondents' second alleged injury was a "procedural injury" flowing from the Secretary of Interior's purported failure to observe the consultation requirement of the Endangered Species Act.[21] Again, however, the purported failure of the Secretary of Interior to observe the consultation requirement impacts all citizens equally. Respondents do not and cannot show that the consultation provision of the Endangered Species Act conveyed upon them any distinct right not enjoyed equally by all citizens. Respondents' asserted "right" to have the government act in accordance with the law is shared with all citizens and, therefore, is insufficient to satisfy Article III standing requirements. *Allen v. Wright*, 468 U.S. at 754; *Valley Forge*, 454 U.S. at 483-84. Respondents merely are attempting to employ a "federal court as a forum in which to air [their] generalized grievances about the conduct of government." *Flast*, 392 U.S. at 106.

The court below found standing predicated on respondents' "procedural injury" based on several decisions under the National Environmental Policy Act of 1969 ("NEPA").[22] 911 F.2d at 121. Three Circuits have recognized "procedural injury" as a basis for standing under NEPA, but each of those Circuits limited such a basis for standing to litigants who could establish a "geographic nexus" to a challenged project and presumably would suffer the environmental consequences result-

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[20](...continued)
other citizens, but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. Nor can future injury be presumed from past use. *See City of Los Angeles v. Lyons*, 461 U.S. at 106.

[21]16 U.S.C. §§ 1531-1544 (1988).

[22]42 U.S.C. §§ 4321, *et seq.* (1988).

ing from the project's failure to comply with NEPA.[23] Because of the "geographic nexus" requirement, these decisions are consistent with the traditional standing requirement of a particularized injury.

For example, if a litigant lives next door to the site of a proposed toxic waste dump that is being established in violation of a particular regulatory requirement, certainly she suffers an injury as a result of that violation distinct from other citizens due to the prospective diminishment of her property value and lifestyle. She may share the injury with many other neighbors, but these neighbors still suffer in a manner distinct from the general public, because of their "geographic nexus" to the proposed toxic waste dump. Their standing is based on an injury to a particular substantive right other than a general interest in requiring the government to comply with regulations it has promulgated.[24]

The Eighth Circuit's decision below, however, expands these decisions under NEPA by reading out any "geographic nexus" requirement. 911 F.2d at 121. By

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[23]*City of Los Angeles v. NHTSA*, 912 F.2d 478, 492-93 (D.C. Cir. 1990); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 931-32 (9th Cir. 1988); *City of Evanston v. Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

[24]The Eighth Circuit's reliance upon the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), to provide a statutory basis for respondents' procedural right is misplaced. This sort of citizen-suit provision cannot create standing under Article III. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) ("citizen suit provisions apply only to persons who can claim some sort of injury"). Respondents must still be able to show a particularized injury to establish standing in order to challenge an administrative action whether the cause of action is brought under such a citizen-suit provision or Section 10 of the APA.

eliminating the "geographic nexus" requirement, however, the court essentially held that a public official's misinterpretation of a statute is, in and of itself, a sufficient basis to provide standing to any person or organization with an interest in the proper interpretation of the statute. Such a result flies in the face of this Court's most recent decisions on standing. *E.g.*, *Allen v. Wright*, 468 U.S. at 754 ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The reasoning of the court below, however, follows directly from this Court's earlier decision in *SCRAP*, and it is not surprising that the Eighth Circuit relied upon *SCRAP*. This result is particularly disturbing given the seemingly unmistakeable message of the Court in *Lujan v. National Wildlife Fed'n* that the mere fact that a lawsuit is brought under Section 10 of the APA does not obviate the need to establish a particularized injury. Thus, the decision below points up the continuing confusion of the lower courts with respect to the requirements for standing under the APA.

Although the Court noted in *Lujan v. National Wildlife Fed'n* that *SCRAP*'s "expansive expression" of what would establish standing under Section 10 of the APA "has never since been emulated" by the Court, the Court treated *SCRAP* as irrelevant to its analysis because *SCRAP* arose in the context of a Rule 12(b) motion to dismiss on the pleadings. 110 S. Ct. at 3189. Because *Lujan v. National Wildlife Fed'n* came before the district court on a motion for summary judgment, lower courts viewed the Court's decision as seeming to suggest that a different standing analysis applied. This "procedural distinction" between *SCRAP* and *Lujan v. National Wildlife Fed'n* has been seized upon by the lower courts, such as the Eighth Circuit below, to mean that, although an

additional burden of specificity in asserting an alleged injury must be met by litigants in the context of a summary judgment motion, the *SCRAP* standing analysis remains valid.

There is no principled justification for the lower courts drawing such an artificial distinction between the standing analysis applicable to litigants faced with a motion to dismiss and litigants faced with a motion for summary judgment. In either procedural posture the plaintiff invoking the jurisdiction of a federal court in order to challenge an administrative action should be required to show a particularized injury distinct from most other citizens. Although the quantum of proof necessary to establish that particularized injury is greater in evaluating a motion for summary judgment than in evaluating a motion to dismiss, the central analysis remains the same -- has the litigant set forth an injury to herself distinct from most citizens?

In order to clarify the standing analysis applicable in the context of lawsuits challenging administrative action, the Court should take this opportunity to articulate formally what should have been clear after *Lujan v. National Wildlife Fed'n* -- that *SCRAP* is no longer good law. The Court has noted in the past that it will not hesitate to overrule a prior decision when such "a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws. . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations

omitted).[25] *SCRAP* and its predecessors fit squarely within this description. *SCRAP* sowed the seeds of doctrinal confusion that continue to bear fruit in the lower federal courts today. These decisions from the early 1970s have been an obstacle to the achievement of a consistent and uniform doctrine of standing grounded in the traditional requirement of a particularized injury. It is clear that the Court has retreated from *SCRAP* and has returned the doctrine of standing to its traditional basis in a particularized injury requirement. In overruling *SCRAP*, the Court would only be recognizing the reality of how its decisions have evolved and the law has changed.

CONCLUSION

The Court's relaxation of the traditional standing requirement of a particularized injury that began in 1968 and culminated with the *SCRAP* decision led to a dangerous overjudicialization of public policy making and an evisceration of the principle of separation of powers. This usurpation by the federal judiciary of powers

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[25]This is particularly true where, as here, time has demonstrated that a prior decision has had an adverse impact upon a constitutional issue such as the principle of separation of powers. As noted in *South Carolina v. Gathers*, 490 U.S. 805 (1989):

> I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout history has freely exercised its power to re-examine the basis of its constitutional decisions."

490 U.S. at 825 (Scalia, J., dissenting) (quoting *Smith v Allwright*, 321 U.S. 649, 665 (1944)).

entrusted by the Constitution to the elected Branches threatened to erode our process of self-governance.

Recognizing these dangers, however, in the mid-1970s, the Court embarked on a retreat from the expansive view of standing articulated in *SCRAP*. The Court rediscovered the central role that the doctrine of standing serves in preserving the principle of separation of powers and restored the requirement of a particularized injury to the standing analysis in all manner of lawsuits not brought under the APA. Finally, last term in *Lujan v. National Wildlife Fed'n*, the Court seemingly acknowledged that there is no principled justification for not also requiring a showing of particularized injury in lawsuits brought under Section 10 of the APA.

The Court should recognize, however, that the lower courts still view *SCRAP* and its predecessors as living creatures in the world of standing analysis. The Court should acknowledge that the law of standing since *SCRAP* has returned to the traditional requirement of a particularized injury and the time has come to give to *SCRAP* the "formalistic burial of a case already dead."[26] In light of its more recent decisions, the Court should formally overrule *SCRAP*, in order to send an unmistakable message to the lower federal courts.

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[26]Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Supreme Court Review 209, 226 (1963).

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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June 27, 1991